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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 196

UNITED STATES OF AMERICA

*Petitioner*

*against*

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

ROBERT J. SYKES
*Solicitor for President and Directors of the Manhattan Company, successor to the Bank of Manhattan Trust Company, Respondent*

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UNITED STATES OF AMERICA,

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PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FOR THE PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY.

### Opinions Below.

The opinion of the District Court is reported in 10 Fed. Supp. 269; the opinions of the Circuit Court of Appeals are reported in 77 Fed. (2d) 866, 880, 881.

## Questions Presented.

1. Whether a decree enacted by the Soviet Government which purports to confiscate and appropriate, without compensation, assets of a Russian Insurance Corporation, is effective to transfer title to such assets which at the time of such decree, and ever since, have been located in the United States.

2. Whether such a decree which is repugnant and contrary to our public policy and shocking to our sense of justice and equity, will be enforced by our Courts.

3. Whether Russian or American law should be applied, where the situs of the assets or the debts is located here.

4. Whether the Executive Department of the United States Government proclaims the public policy of the country.

5. Whether Litvinoff's letter of November 16, 1933, to the President of the United States, purporting to assign amounts due by American Nationals, includes the funds of the Northern Insurance Company of Moscow, a Russian National.

6. Whether the petitioner's interpretation of Litvinoff's letter of November 16th, to President Roosevelt, must be adopted, and precludes this Court from an examination of the assignment for the purpose of determining its scope and extent.

7. Whether the mere fact that the United States of America is the plaintiff justifies the interference, by the Federal Court, with a proceeding *in rem* properly pending in a State Court, where the State Court had priority of jurisdiction and still has possession of the *res*.

## Statement.

The Northern Insurance Company of Moscow was organized under the laws of the Empire of Russia in the year 1872 (R. 10). It was during the ensuing years, up to the overthrow of the Czaristic regime, one of the outstanding insurance companies in Russia. In 1911, it established an United States branch (R. 10). It made the usual statutory deposit required by the Insurance law in this State and thereupon commenced business through its New York office (R. 10). It continued in the transaction of business from the year 1911 until April, 1925 (R. 10). In that year, the Superintendent of Insurance brought a proceeding, pursuant to Sec. 63 of the Insurance Law, to take possession of its assets for the benefit of its policyholders and creditors, on the ground that continued operation and further activity by the Company was hazardous to its policyholders and creditors (R. 10).

In June, 1926, an order was entered in the New York Supreme Court, in this county, in such liquidation proceeding, authorizing the Superintendent of Insurance to take possession of the property and assets of the Northern Insurance Company of Moscow, for the protection and benefit of *its policyholders, creditors, stockholders and the public* (R. 10).

Thereafter, the Superintendent of Insurance proceeded with the liquidation of the Company and continued with such duties until the 16th day of December, 1932, when he filed his fourth and final report as liquidator of the United States branch with the New York Supreme Court (R. 11). The Superintendent of Insurance, during his liquidation of the Northern, paid all of the policyholders and creditors who had transacted business with the United States branch, and after such payment a substantial surplus remained (R. 11).

Under an interpretation of the Insurance Law, the Court of Appeals had ruled that the Superintendent's function was to deal only with those claims arising out of business transacted with the United States branch.

*Matter of People* (Norske Lloyd Insurance Company), 242 N. Y. 148; 249 N. Y. 139.

With a disclosure of a surplus remaining after the payment of the claims just referred to, the Northern instituted a proceeding in the New York Supreme Court seeking the return to it of its surplus assets (R. 11).

Prior to the application for such relief, a demand had been made upon the Superintendent of Insurance that he turn over the funds to the Company and its directors, but this demand had been refused upon several grounds. The Superintendent of Insurance asserted that the Company was defunct, that its directors had no authority to act on its behalf, and that the fund should be retained by the Superintendent of Insurance until this country had accorded recognition to the Soviet Government. The surplus which was thus applied for by the Northern was the balance of assets which had been deposited with the Superintendent of Insurance, under the statutory provision heretofore referred to, plus accretions which had grown out of the transaction of business here (R. 11). The funds then in the hands of the Superintendent of Insurance, or presently in the possession of the defendant Bank, have at all times been in this State and never within the territorial confines of Russia. When the Northern applied to the New York Supreme Court for the return of its surplus assets, the application met with vigorous opposition from the Superintendent of Insurance (R. 11). This opposition continued in the Appellate Division and the Court of Appeals (R. 11). In February, 1931, the Court of Appeals gave

heed to the plea of the Northern and other Russian insurance companies for a return of their surplus assets. Comprehensive decisions were handed down by that Court touching upon various phases of the Russian situation, and among these decisions was one directly involving and passing upon the right of the Northern to reclaim its assets.

*Matter of People* (Northern Ins. Co.), 255 N. Y. 433.

The Russian situation, for the first time in the history of the Insurance Law, created what might be termed an anomalous state of facts with respect to the liquidation of an insurance company. Ordinarily in the case of a foreign insurance company placed in liquidation in the State of New York, under what was formerly Section 63 of the Insurance Law and which has now been adapted and carried over into the present Section 400, the Superintendent of Insurance acted as the ancillary receiver of such company in the marshaling of assets in the State and the allowance, disallowance and payment of claims. Up to the presentation of the complexities arising out of the overthrow of the Czaristic Government by the Soviets, every instance which had been submitted to our court of a foreign insurance company in liquidation presented a state of facts in which there was a domiciliary receiver. The procedure under such circumstances presented no unusual difficulties. After the payment of claims of those who were entitled to be paid the Superintendent of Insurance merely remitted the surplus to the domicil of the corporation and into the possession of the domiciliary receiver. In the Russian cases this was impossible of performance. When the various Russian insurance companies petitioned the Courts in the State of New York and the matter was finally decided by the Court of Appeals, there was complete comprehension by the Court of the fact that there could not be any

transmission of funds to a domiciliary receiver because none existed.

Careful examination of the various opinions which were written in the case of each company very clearly discloses that the Court was only considering the rights of which might be termed "foreign creditors". The term "foreign creditors" here is used merely to denote those creditors who had not dealt with the United States branch, although as a matter of fact it included among such so-called foreign creditors here many American citizens and residents of this country. The New York Court of Appeals in its various decisions pointed out that to deny these so-called foreign creditors any relief was in effect to unjustly deprive them of any remedy in that or any other forum. It was observed, of course, that they had no standing in the Russian courts, and even so their standing would be ineffectual because our courts do not permit a release of the surplus assets for transmission to a country whose decrees had not been recognized.

The Court of Appeals ordered the Superintendent of Insurance to turn these funds over to the Company's directors, upon condition that such directors should execute an appropriate surety company bond to the people of the State of New York in an amount equivalent to the value of the assets so delivered. The decision further provided that such delivery was conditioned upon a clause to be inserted in the bond that the directors would faithfully apply the assets to the use of the Corporation, *its creditors and shareholders.* In the event that the bond could not be furnished, then the funds were to be delivered to a trust company in the City of New York as *agent or depositary.* The delivery of such assets to an agent or depositary was further safeguarded by preventing their withdrawal except upon the order of the Court. At the time the matter was

presented to the Court of Appeals, it appeared that the Northern had assets in excess of its liabilities.

After the decision of the court ordering the release of the funds, it was found, however, that the distribution of the assets of the Northern through the directors would be attended with difficulties and would be highly impracticable. This was due to the non-residence of the directors and their absence in Europe. Thereupon, an application was made in the Court of Appeals for the amendment of the remittitur, so as to permit the alternative provision to be availed of. That motion was granted and the funds were directed to be turned over to The Bank of Manhattan Trust Company, the predecessor in interest of the defendant.

*Matter of People* (Northern Ins. Co. of Moscow), 262 N. Y. 453.

That transfer was again conditioned upon a stipulation that the funds would not be withdrawn except upon the order of a court of competent jurisdiction. At the time the surplus had been ordered turned over to the directors of the Company, a number of claims were filed against the fund, with the result that these claims greatly exceeded the amount of surplus assets on hand.

To avoid inequality among the creditors and to prevent attachment or other proceedings, the Northern made a general assignment for the benefit of creditors to The Bank of Manhattan Trust Company, as assignee. The Bank qualified as assignee (R. 12), and proceeded upon the performance of its trust, pursuant to the provisions of the Debtor and Creditor Law (R. 12).

Thereafter, the Court authorized and directed The Bank of Manhattan Trust Company, as agent or depositary of the Northern, to release, transfer and deliver to itself, as

assignee, all of the funds in its possession (R. 12). Claims were advertised for, assets marshalled and in May, 1934, the defendant filed its final account as assignee in the New York Supreme Court (R. 13).

The Court appointed as Referee, Hon. John Godfrey Saxe to take and state the account of the assignee and to hear objections thereon (R. 13). The Referee was further directed in the order of reference to take proof and report as to the persons entitled to share in the distribution of the Estate and in what priority and proportion (R. 13).

The Referee proceeded to take proof as to some of the claims and was so engaged when this action was launched by the Government. Reports have been filed covering certain claims and the remaining claims before him are now the subject of investigation and examination by him (R. 13).

The Bank now holds in its possession, as assignee, approximately $249,000.00.

## SUMMARY OF ARGUMENT.

### I.

Each country within its territorial limits maintains its own laws and establishes its own order. These laws are restricted to property and persons within its own jurisdiction.

The State having physical control of property within its borders can legislate with respect to said property and supervise a transfer according to its laws. Such transfer and the principles authorizing it are not rendered ineffectual by the fact that such transfer as carried out is not in accordance with the requirements of law in the

country where the owner is domiciled. In any event whatever has been done in the interim between the establishment of a foreign government and its recognition by the government of the United States is not subject to attack and is valid as against the world.

When a foreign corporation comes into New York State and transacts business there, it must yield obedience to our laws. Our courts will disregard the fiction of the corporation's residence in the state of its origin when a prohibited act done in the domiciliary state violates the sound public policy of the forum.

Creditors in this country may pursue their remedies against property in this forum in derogation of the claim of an alleged universal successor who derives his title from a transfer made in the country of the corporation's domicile, where said creditors are proceeding in accordance with the policy of administration fixed by the law of the forum. While the lex domicilii might destroy the remedy of creditors in the Russian Empire it could not destroy their right to proceed against a fund in another jurisdiction to satisfy their debts where the law in that jurisdiction sanctioned such a procedure and recognized their claims.

## II.

The public policy of the Government is to be found in the Constitution, the laws and the course of administration of justice. Contracts are unenforceable whenever a state indicates that such arrangements are repugnant to its policy, and contrary to good morals and justice. Sweeping legislation nationalizing, without compensation to former owners, insurance corporations and other industries is confiscatory in character and contrary to our public policy. This public policy will be enforced to prevent the seizure

of property here against one claiming title under the confiscation decrees. This is so irrespective of the recognition by this government of the sovereignty whose decrees are under review. It is not sufficient for a right to have been duly acquired on the territory of a foreign state to be capable of automatic enforcement. The case is not unseldom when the exception of public order has been employed and the adoption of foreign legislation refused.

## III.

The Litvinoff assignment must be strictly construed since private rights are at stake and the sovereign parties are dealing in private causes of action. A logical interpretation of the correspondence and one most favorable to the Government, indicates that a fund of the character held by the Bank as Assignee for the benefit of creditors was not embraced therein. It would appear, moreover, that the decrees were intended to transfer such title as remained after liquidation. An orderly proceeding for the liquidation of claims being in progress in the courts of New York State, the Soviets' attempted assignment was premature, and the United States, being the successor to a party whose title had not ripened into being, could acquire no right under the instrument. An executive agreement cannot deprive private individuals of their vested rights.

## IV.

Over the property affected the State Court has possession and control. Since the present suit by the Government has as its object a disposition of the same property, which it is claiming as owner, the action is one in rem. Under such circumstances such possession will not be disturbed by process out of the Federal Court. In the

absence of an express grant the Federal Courts do not have exclusive jurisdiction over controversies where the United States is a party. On the contrary, the Government's rights are fixed by the same principles controlling in actions by private litigants. By intervening in the State Court proceeding the United States, as a claimant, is not being sued directly or indirectly.

## ARGUMENT.

### I.

### The decree under construction, one of confiscation and seizure of private property without compensation, is wholly ineffective to transfer title to property located and situated in the United States.

#### A.

There is no claim by the petitioner that the fund sought to be recovered in this action was physically located in Russia at the time the Soviet decree was promulgated. On the contrary the fund has been in the State of New York since the creation of the United States branch of the Northern, and since 1911 the property constituting such fund, which consists of cash, stocks and bonds, has either been in the possession of the Superintendent of Insurance under the Insurance Law or the defendant bank. There is thus directly raised the question of whether the Soviet decree was effective to transfer title to personal property which was situate without the jurisdiction of the Soviets. The Soviets may no doubt legislate for and give judgment in connection with property and persons within its own territory. Our courts, however, have never sanctioned a rule of law granting authority to any foreign government to adjudicate upon property not within the territorial con-

fines of the government whose decree, law, judgment, legislation or order is under review. It has been a long-established principle of international law that a foreign law can never affect property situate without the jurisdiction of the law-giver. Our own courts have been uniform in denying effect to foreign laws which sought to operate on property or rights in this or jurisdictions other than that of the country whose laws are sought to be enforced. It is true that the foreign law will be enforced if compatible or similar to our own, but if a conflict appears either because it is repugnant from a standpoint of morals or equity or because of the conflict of legal principles, our courts will sustain the law of the forum rather than the law of the foreign jurisdiction. *Baglin* v. *Cusenier*, 221 U. S. 580; *Hilton* v. *Guyot*, 159 U. S. 113; *Second Russian Ins. Co.* v. *Miller*, 268 U. S. 552; *Second Russian Ins. Co.* v. *Miller*, 297 Fed. 404; *Lehigh Valley R. Co.* v. *State of Russia*, 21 Fed. (2nd) 396; *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248; *Hamilton* v. *Accessory Transit Co.*, 26 Barb. 46; *Huntington* v. *Attrill*, 146 U. S. 657; *Oscanyan* v. *Arms Co.*, 103 U. S. 261.

In the instant case the defendant acquired title to the fund in suit as the result of an assignment by the Northern Insurance Company of Moscow, to wit, in 1932, more than a year prior to the recognition of the Russian government. It would be an extraordinary doctrine to say that that title was rendered nugatory and destroyed by a decree made in Russia in 1918, more than 14 years prior to the date of the assignment. The decree by its very language indicates that it was intended to be effective solely within the jurisdiction of the Russian government. The Soviets even so construed it (R. 39, 41). Property rights vested in this country by American courts may not thus be disregarded or transferred by the arbitrary act of a

foreign government where such act consists of a decree or statute penal in its nature and of the type relied upon by the petitioner in this action.

The cases of *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, and *Ricaud* v. *American Metal Co.*, 246 U. S. 304, are cited by the petitioner for the contention that our courts are not concerned because title has been acquired by confiscation or other unlawful methods. These cases are readily distinguishable because in each the property in question was located in Mexico, whose decrees and law were under consideration. Careful search has disclosed no instance where either our courts or those of England or France have lent effect to a decree of confiscation where it purported to transfer title or rights located in another jurisdiction.

In *Baglin* v. *Cusenier, supra,* this Court, speaking through the present Chief Justice, stated (p. 596):

> "We are not concerned with their authority under the French law to conduct this business, but it is not the business to which the trade-marks in this country relate. That business is being conducted according to the ancient process by the Monks themselves. *The French law cannot be conceived to have any extra-territorial effect to detach the trade-marks in this country* from the product of the Monks, which they are still manufacturing."

In *Lehigh Valley R. Co.* v. *State of Russia, supra,* Judge Manton, writing for the Circuit Court of Appeals and who, it will be noted, wrote the dissenting opinion in this case, said (p. 401):

> "It is only the acts performed in its own territory that can be validated by the retroactive effect of recognition".

In *James & Co.* v. *Second Russian Ins. Co., supra,* the New York Court of Appeals said (p. 255):

> "The decree of the Russian Soviet Government nationalizing its insurance companies has no effect in the United States" * * *.

In *Hamilton* v. *Accessory Transit Co., supra,* the court had under review a legislative enactment of Nicaragua. The defendant was a Nicaraguan corporation. The decree of the Nicaraguan government purported to annul and abolish the defendant corporation. There was considerable property of the corporation within the United States. The court said:

> "This was an act of despotic power, passed without notice to and without hearing the company, and contrary to the charter granted to it, which provided for the settlement of the disputes between the government and the state, by commissioners to be mutually chosen. *The government had no jurisdiction over the property of the corporation beyond the state of Nicaragua, and its decree (made without hearing the company) was a nullity as to such property.* It may be presumed that, as dictatorial power was assumed by that administration, it could have made a decree absolutely revoking the charter, and that this would have been deemed by other states valid, as to property in Nicaragua * * *."

Mr. Justice Story in *The Apollon,* 9 Wheat. 362, 370, 6 L. Ed. 111, said:

> "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. *They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.* And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction."

The petitioner recognizes that in a long line of decisions the Court of Appeals in New York rejected the present decree and others of similar purport, and held that they could not transfer rights to property located within this country. It is urged, however, that in *Dougherty* v. *Equitable Life Assurance Soc.*, 266 N. Y. 71, which is probably the last pronouncement of the Court of Appeals on the "Russian situation", that the court adopted a view which was a radical departure from its earlier decisions. An examination of that case discloses that, on the contrary, the Court's decision was entirely consistent with the views it had laid down in a long line of cases involving the Russian decrees. The case is easily distinguishable from those which had been passed upon by the Court in its earlier decisions.

In *Dougherty* v. *Equitable Life Assurance Soc., supra,* the Court had under construction a policy of Insurance issued in Russia, delivered in Russia to Russian subjects, which by its very terms provided that in the interpretation of its clauses and in the application of the provisions of the policy or in case of any dispute the parties were to be governed by Russian law. Recognition between Russia and the United States having occurred prior to the decision in this case, the Court of Appeals of necessity gave full force and effect to the Soviet decree which by its terms purported to destroy or confiscate the rights of the policyholders.

In the foregoing case Judge Lehman, in his concurring opinion very aptly pointed out (p. 108):

> "Our earlier decisions, and they are many, refusing to give extraterritorial effect to the decrees of the Soviet government were *not* based on lack of recognition * * * Even before recognition we decided * * * that a confiscatory decree of the

> Soviet government of property situated in Russia results in transfer of title. Even after recognition, we have decided that they were ineffective to destroy rights to property tangible or intangible with a situs elsewhere."

In the present case the defendant bank took the fund in question located in this jurisdiction not subject to Russian law, because Russia was not then recognized, but subject to the Debtor and Creditor Law of the State of New York enacted by the Legislature of such state, and furthermore pursuant to decisions of the New York Court of Appeals and inferior courts of that state declaring title to the funds or the assets to be in the Northern Insurance Company of Moscow, and further declaring that they were distributable here to the creditors and stockholders. To say that these laws and decisions directly affecting title to property in this jurisdiction are to be discarded in favor of a confiscatory decree is to pronounce a new principle of international law which has never been favored by the leading nations of the world.

The petitioner concedes that under the New York Insurance Law, Section 27, the situs of the assets at the time of the enactment of the decree in 1918 was in New York, and further concedes that it remained here at all times, but without support in the authorities, we submit, now urges that this situs was lost when the Superintendent of Insurance concluded his administration of the trust for the benefit of those creditors who had dealt with the United States branch. We shall show on the contrary the situs of the assets has never changed since they were first placed here in 1911. It is submitted that once it is found that the situs of these assets is in this country the government's claim is at an end.

B.

**The English courts have refused to enforce Russian decrees where they affect property located in England or outside Russian territory.**

The English courts have uniformly denied extraterritorial effect to Russian decrees with regard to property situate outside of Russia. In all of the English decisions examined it will be found that the court has upheld the doctrine that the decrees of the Soviet government were limited in their application to property in Russia.

In the House of Lords' decision in *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1924), A. C. 112; 40 TLR 837; the Lord Chancellor, Viscount Cave, alluding to the above decision, stated at page 840:

> "But the Soviet Government has been recognized by Great Britian as the lawful Government of Russia; and this being so its decrees must, as Lord Justice Bankes said in *Luther* v. *Sagor* (37 The Times L. R. 777; [1921] 3 K. B., 532), be treated by the Courts of this country as binding *so far as the jurisdiction of the Russian Government extends*";

and further, speaking of shares in Russian companies confiscated by a Soviet decree, stated at page 841:

> *"I am unable to understand how such an order could be effective to confiscate or destroy shares held by persons out of the jurisdiction of the Soviet Government";*

and, again, at page 843:

> "* * * but it is plain that there were many English shareholders, and in my opinion the order of January, 1918, did not effectively confiscate their shares."

In *Sedgwick Collins & Co. Ltd.* v. *Rossia Insurance Company of Petrograd* (1925), 1 K. B. (C. A.) 1; 41 TLR 663; the Court of Appeal, per Sargant, L. J., stated at page 666:

> "Nor do I think that the position of creditors here as against property of the Rossia Insurance Company here, such as debts owing to them from debtors in this country, is altered by legislation or decrees of the Russian sovereign power which 'nationalized' the undertaking and assets of the Rossia Insurance Company; that is, as I understand it, purported to transfer these assets from their private proprietors to the Russian nation as a whole. *Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country such as debts owing from debtors here.* See Dicey, Conflict of Laws, 2nd Ed., p. 310, and Lecouturier and Others *v.* Rey (26 The Times L. R. 368; [1910] A. C. 262); an analogous case with reference to the goodwill of, a trade-mark or trade-name in England".

This case later came before the House of Lords, *Employers Liability Assurance Corporation, Ltd.* v. *Sedgwick Collins & Co., Ltd.* (1926), A. C. 95; 42 TLR 749. Assuming, that the liquidation of the Rossia in Russia (it should be borne in mind that the House of Lords, following the decision in the *Mulhouse* case, *supra*, held that the decree of 1st December, 1918, did not dissolve insurance companies but merely placed them in liquidation) might be annulled at some later time, the Lord Chancellor, Lord Cave, said at page 751:

> "If the liquidation should be annulled, the Company will resume its powers; and in the meantime it retains its title to any property not taken away from it—including (in the present case) *the property and rights of the company in countries foreign to Russia,*

*which are not effectively taken from it by the Russian legislation."*

In The Jupiter (No. 3) (1927), 43 TLR 210, Hill, J., stated at page 215:

> "The decision in Sagor's case (supra) is not in point, for the decree of the Russian Socialist Soviet Republic admittedly had, and it was treated as having, the effect of nationalizing the goods in question, which at the time the decree was passed were admittedly within the territory of the R. S. F. S. R.";

and, directly to the point at issue in that case, at page 217:

> "As to the second question—that is, the question whether the decrees, when they operated, * * * provided for * * * the transfer of its property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. *If the Jupiter was not within the territory of the R.S.F.S.R., I do not see how the mere passing of a decree could transfer the property.* This seems to me to be recognized in all the cases: see, for instance, per Lord Justice Atkin in Goukassow's case (39 The Times L. R. at p. 576; [1923] 2 K. B. (C. A.) at p. 693); per Lord Justice Sargant in Sedgwick Collins & Co., Ltd's case in the Court of Appeal (41 The Times L. R. at p. 666; [1926] 1 K. B. at p. 15); and per the Lord Chancellor in Sedgwick Collins & Co. Ltd's case in the House of Lords (42 The Times L. R., 749; [1927] A. C. 95). The Lord Chancellor treats it as obvious that the property and rights of the company in the countries foreign to Russia are not effectively taken from it by the Russian legislation".

Mr. Justice Hill's decision was affirmed on appeal, The Jupiter (No. 3) (1927), P. (C. A.) 250; 43 TLR 741; Bankes, L. J., stated at page 743:

> "By a decree made in January, 1918, the whole of the property of this Russian company was nationalized and, therefore, the property passed to the Soviet Republic, *provided that that Republic was in a position to, and did in fact, take possession of the property of the Company, including the Jupiter*".

Although there have been changes which have taken place since those decisions were rendered, in the attitude of the English Courts towards many "Russian questions" particularly with respect to the continued corporate existence of Russian companies, the doctrine denying to the Soviet confiscatory legislation any effect whatever on property situate outside the U. S. S. R. has been strictly adhered to to this day.

In an unreported but particularly pertinent decision in *Woronin, Luetscheg & Cheshire* v. *Frederick Huth & Co.* (1928), K. B., Mr. Justice Wright said:

> "In my judgment these confiscatory decrees have no extra-territorial effect, though they are effective in Russian territory, as was held by the Court of Appeal in Luther *v.* Sagor, supra. This is in accord with the opinion of the Lord Chancellor, Lord Cave, in Employers Liability, &c., Ltd. *v.* Sedgwick Collins & Co., Ltd., supra, and by Lord Justice Sargant in the same case in the Court of Appeal, supra, and Mr. Justice Hill and the Court of Appeal in The Jupiter (No. 3), supra, to which I have referred. The same principles were applied in Lecouturier *v.* Rey (1910) A. C. 262, supra, and in other cases cited in Dicey, On Conflict of Laws, 4th Ed., p. 576, not (h). The recognition by the English Government of the Soviet Government does not affect this conclusion. *The bonds and money in question were at no time within the jurisdiction of the Soviet Government and in my opinion are still the property of the plaintiff company.*"

and gave judgment for the plaintiffs for some £70.000. No appeal was taken.

In *First Russian Insurance Company (In Liquid.)* v. *London & Lancashire Insurance Co. Ltd.* (1928), Ch. D. 44 TLR 583, Mr. Justice Romer said at page 587, speaking of the decree under review in the instant case:

> "Now the decree provides in effect that as from December 1st, 1918, insurance of all kinds within the jurisdiction of the Soviet Government is the monopoly of the State. *For the decree has no extra-territorial effect;* see The Jupiter (No. 3), (43 The Times L. R. 741; [1927] p. 250)".

One of the last reported Russian cases decided by the English courts is *Russian Bank for Foreign Trade, In re* (1933), 133 Ch. D. 745, 49 TLR 253, where Mr. Justice Maugham said:

> "The Soviet decrees, *so far as their jurisdiction extended,* had taken away all the bank's assets, and all its shares had been annulled and destroyed",

He further stated:

> "Evidence had been given disputing that any sum was due to the petitioner, and there was a real question in dispute—namely, whether the debt to him was or was not locally situate in Russia at the date of the relevant decrees. If it was, it seemed to him that the debt was no longer due by the bank as a corporation, and that the petitioner's only claim was against the Soviet State. *If, however, it was recoverable in London, it was not affected by the Soviet legislation, even though it was due to one who was a Russian subject at the date of the decrees*".

We submit that this line of clear and consistent decisions following one another over a period of thirteen

years is conclusive. Foreign legislation cannot affect property situate without the jurisdiction of the law giver.

The petitioner cites *Luther* v. *Sagor* (1921), 3 K. B. (C. A.) 532, 37 TLR 777, in support of the contention that our courts must enforce the confiscatory decree of the Soviets. The reason for the English Court of Appeal upholding a confiscatory decree in that case is readily understood when it is pointed out that there was involved a question of title to goods seized by the Soviets in Russia and *at all times situate and located in that country.* As a matter of fact, Bankes, L. J., was careful to state at page 779:

> "The question before the Court is not one in which the assistance of the Court is asked to enforce the law of some foreign country to which legitimate objection might be taken, as in Hope *v.* Hope (8 De Gex, Mac. and G., 731) and Kaufman *v.* Gerson (20 The Times L. R. 277 [1904], 1 K. B. 591). The question before the Court is as to the title to goods lying in a foreign country which a subject of that country, being the owner of them by the law of that country, has sold by a f.o.b. contract for export to this country."

The petitioner also relies on *Lazard Freres* v. *Midland Bank* decided by the House of Lords in 1932 A. C. 289. Neither the House of Lords nor the Court of Appeal questioned the following statement made by Mr. Justice Roche in the court in which the case first originated. In his unreported opinion, K. B. 1931, the learned Justice stated:

> "There is one consideration which is of overwhelming importance for the determination of this case, namely, that the fund or debt upon which it is sought to levy execution is in England and subject to English law. *It is well settled, and the contrary view*

> *was not contended for on either side in this case, that no Soviet legislation has any force or effect to transfer or confiscate money or property in England* —see Mulhouse case, supra, Sedgwick Collins' case, supra, and The Jupiter (No. 3), supra."

As a matter of fact, this view was, if anything, reaffirmed and given increased dignity by the statement of Lord Wright in the House of Lords, who said at page 289:

> "Both these debts were English debts, payable in England and governed by English law".

Even the prevailing opinion in the Circuit Court of Appeals explicitly adheres to the principle of the strictly territorial effect of foreign laws. Thus, speaking of the Soviet decree, it carefully limits its statements:

> "When our government recognized that Government the public policy of this country to recognize the validity of Soviet decrees *within Soviet territory* was established. * * * The Russian State obviously could, and this record shows that it did, confiscate everything belonging to this corporation *within the confines of Russia.* * * * When the executive branch recognized the Soviet Government, the judicial branch became bound to recognize the validity of Soviet decrees *in Soviet territory.*"

There are printed in the record in this case two circulars, issued by the Soviets construing the decree in question (R. 39, 41). Both were published and issued by the People's Commissariat for Foreign Affairs. One is dated April 12, 1922, and was followed by another dated September 26, 1923. It is stated in the Government's brief in a footnote to pages 33 and 34 that these circulars were "Cited at length and passed upon in *Perry* v. *Equitable Life Assurance Society,* 45 T.L.R. 468 K. B. 1929" and it is said that in that case

the court held that they did not consider them binding as declarations of Russian Law. Examination of that case discloses that it was an action against the Equitable Life Assurance Society, a New York corporation, brought upon a policy of life insurance issued in Russia to a Russian subject. The policy by its terms specifically provided that "all disputes which might rise in connection with the insurance operations carried on by the Society in Russia, should be settled according to Russian laws in Russian courts of justice". The case, therefore, was decided and governed by the same principles, which were applied by the Court of Appeals in *Dougherty* v. *Equitable Life Assurance Soc.* (*supra*). Furthermore, the circular of April 12, 1922, was not even passed upon by the court. Of the two this circular has a definite bearing on this argument, *supra*. This circular, it will be noted, speaking of the decrees very definitely states, "It does therefore, determine only such legal relations pertaining to property rights as arise on territory of the R. S. F. S. R. Legal relations pertaining to property rights whereof the subject-matter is situated outside of the territory of the R. S. F. S. R. and is not connected with such territory, cannot be governed outside of the territory of the R. S. F. S. R. by Russian law, and are,—irrespective of the nationality of the persons entitled to such rights, be they even Russian citizens,—subject to the effects of local law".

The construction put upon the decree by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.

*Hastings, etc. Railroad Co.* v. *Whitney*, 132 U. S. 357;
*United States* v. *Moore*, 95 U. S. 760;
*United States* v. *Johnston*, 124 U. S. 236.

C.

**American law is the only law applicable to the determination of this case.**

The dispute arises between two parties, each claiming title to the fund in possession of the President and Directors of Manhattan Company.

The defendant in the instant case asserts title by virtue of an assignment made by Northern Insurance Company of Moscow for the benefit of its creditors. Immediately prior to the assignment the Court of Appeals had recognized the existence of the corporation and the fact that it had title to the assets in this jurisdiction. The Court in its decision, which is reported in 255 N. Y. 433 ordered the release of the surplus assets to its then existing directors. The corporation had sufficient vitality to make an assignment for the benefit of creditors (R. 12).

The Court of Appeals expressly held in the case of *Matter of People* (Russian Re-Insurance Company), 255 N. Y. 415, that it would not direct the funds be retained until the recognition of a government in Russia to the prejudice of all creditors and shareholders. In that case, the Superintendent of Insurance had completed the liquidation in New York State of certain Russian insurance companies, and had distributed proceeds to those creditors whose claims arose out of domestic business. A surplus remaining, the question arose as to whether creditors whose claims did not arise out of domestic business, should be enjoined from pursuing their legal remedies against the funds. The Superintendent of Insurance took the position that in view of the hazards and uncertainties in the Russian situation, the surplus should not be paid to anyone, but should be left in his hands until a government recognized by the

United States should function in territory of the Russian Empire. The Appellate Division upheld the contention of the Superintendent and entered a decree accordingly. The Court of Appeals rejected the view of the Appellate Division and reversed the orders. In the course of the opinion, Mr. Justice Cardozo, the then Chief Judge of the Court of Appeals, stated (p. 422):

> "We are unable to accept the view that postponement to the Greek Kalends is the fitting answer to a prayer that the Court unlock the fund, and formulate a plan of release and distribution. * * *
>
> "Liquidation is over, and there has been a fulfillment of the trust for which possession was assumed. Even so, the creditors not within the trust are to be stayed indefinitely and perhaps forever from the pursuit of any remedy, either in equity or at law. We may doubt whether an injunction so unmeasured is consistent with constitutional immunities, and, in particular, with the privilege of access to the courts." (Sliosberg *v.* New York Life Insurance Co., 244 N. Y. 482; Truax *v.* Corrigan, 257 U. S. 312, 334.) "What cannot be doubted with reason is its hardship and inequity. In the silence of the statute, a decree instructing the liquidator as to the administration of the surplus must conform to the exactions of equity and justice. * * *
>
> "The fund being thus subjected to the remedies of creditors, the question must still be answered how the surplus is to be disposed of after such claims have been allowed. We think the surplus then remaining should be paid to the corporations, represented by directors, a quorum of the board."

In *Matter of People* (City Equitable Fire Insurance Company), 238 N. Y. 147, 156, the Court referring to Section 63 of the Insurance Laws, stated:

> "The Superintendent, is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this State or in the United States but for the interest of all its policyholders, creditors and stockholders wherever they may be. He is to liquidate the business here for that purpose."

Numerous decisions in the courts of New York have established the policy that the title of a foreign assignee will not be recognized or enforced in New York State where creditors, whether foreign or domestic, are pursuing their remedies in that jurisdiction.

*Matter of Accounting of Waite*, 99 N. Y. 433;
*Osgood, et al.* v. *Maguire*, 61 N. Y. 524, 529.

Particularly where the proceeding was commenced before the intervention of the foreign assignee and prior liens have been acquired by the creditors is this rule true.

*Willitts* v. *Waite*, 25 N. Y. 577, 586.

In *Hibernia National Bank* v. *Lacombe, et al.*, 84 N. Y. 367, 384, the Court said:

> "The remaining question relates to the claim made by Messrs. Lacombe and others, commissioners appointed by the court in Louisiana. Neither the law nor the adjudication under which they were appointed can have any operation here. They are strictly local and affect nothing more than they can reach. For the rule, as we conceive, is well settled that an assignment by virtue of or under a foreign law does not operate upon a debt, or right of action, as against a person in this State. The plaintiff as we have seen, although a foreign creditor, is rightfully in our courts pursuing a remedy given

> by our statutes. It may enforce that remedy to the same extent and in the same manner and with the same priority as a citizen. Any other construction would make the permission of the statute a form without benefit; a formality, and not matter of substance; a mere delusion. Once properly in court and accepted as a suitor, neither the law, nor court administering the law, will admit any distinction between the citizens of its own State and that of another. Before the law and its tribunals there can be no preference of one over the other. (Abraham *v.* Plestoro, 3 Wend. 548; Johnson *v.* Hunt, 23 id. 91; Hoyt *v.* Thompson, 5 N. Y. 351; Merrick *v.* Van Santvoord, 34 id. 217; Blake *v.* Williams, 6 Pick. 206.)"

In *Martyne* v. *American Union Fire Ins. Co.*, 216 N. Y. 183, the title of the statutory liquidator of a dissolved Pennsylvania insurance company was recognized because his title was in harmony with New York law. The Court at page 192 of its decision expressly held that the title of foreign statutory assignees is recognized and enforced only "where it can be without injustice."

The United States claims title by virtue of a later assignment from the Soviet Government, whose title was allegedly acquired by virtue of the Confiscatory Decree of December 1, 1918.

> "It can require no argument to show, that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor." (U. S. *v.* Buford, 3 Peters, 12, 30.)

Since the issue is title to a specific *res* within the jurisdiction of New York State, the universal successor must submit to the mandate of the sovereignty that has physical control of the property which he desires to reduce to his possession. *Clark* v. *Williard* (294 U. S. 211).

Justice Cardozo in speaking of the rights of the statutory successor of an Iowa corporation in respect of corporate assets located in Montana said:

> "In respect of his subjection to the power of the local law, his position is no better than that of the dissolved corporation to whose title he has succeeded or of its voluntary assignee upon a trust for all the creditors. He must submit to the mandate of the sovereignty that has the physical control of what he would reduce to his possession."

In *Keller, et al.* v. *Paine,* 107 N. Y. 83, 89, the New York Court of Appeals stated:

> "The general rule that the voluntary transfer of personal property wheresoever situated, is to be governed by the law of the owner's domicile, always yields when the law and policy of the state where the property is actually located, have provided a different rule of transfer from that of the state where the owner lives."

To this effect are all authorities.

*Warner* v. *Jaffray, et al.,* 96 N. Y. 248, 255;
*Dearing* v. *McKinnon Dash & Hardware Co.,* 165 N. Y. 78, 87;
*Hervey, et al.* v. *R. I. Locomotive Works,* 93 U. S. 664;
*Booth* v. *Clark,* 17 How. 322;
*Security Trust Co.* v. *Dodd Mead & Co.,* 173 U. S. 624.

The creditors before the State Court in the assignment proceeding include: (1) Nationals of the United States who rendered services to Northern in connection with the administration of its assets here*; (2) Officers and directors

*The services referred to are legal in character, rendered by attorneys in connection with litigation in this jurisdiction.

of the Northern who rendered services in connection with the administration of its assets in New York State and elsewhere outside of Russia; (3) Creditors whose contracts† were made with the Northern in foreign countries other than Russia and whose rights to assert their claims have been recognized by the courts of the State of New York. Some of the claims of creditors have been allowed and ordered paid. Their rights should not be destroyed or impaired by Soviet legislation.

It is of no consequence whether the funds on deposit with the New York bank are tangible or intangible.

> "Over this intangible property the State has the same dominion that it has over tangible property".
>
> *Security Bank* v. *California*, 263 U. S. 282, 285.

> "But the question who is the owner of the paper depends upon the law of the place where the paper is. * * * upon the things done being sufficient by the law of the place to transfer the title".
>
> *Disconto-Gesellschaft* v. *U. S. Steel Co.*, 267 U. S. 22, 28;
>
> *Burnet* v. *Brooks*, 288 U. S. 378, 399;
>
> *City Bank Co.* v. *Schnader*, 293 U. S. 112, 118-119.

This rule has been established for a considerable period. It was generally approved by Lord Blackburn in *Castrigue* v. *Imrie*, L. R. 4 E. & I. A. 429. The following is a quotation from the opinion in that case:

> "In the case Gammel *v.* Sewell a more general principal was laid down, namely, that 'if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere' ".

† The claims mentioned in subdivision 3 arose out of contracts of reinsurance or policies of marine or cargo insurance, which contracts were not subject to Russian law but were made in jurisdictions other than the State of New York.

In *City Bank* v. *Barrow* (1880), 5 A. C. 664, Lord Blackburn said:

> "'The pledge upon which the defendants claim was made in Canada in respect of goods then in Canada. I take it therefore that there is no doubt that the validity of the pledge depends upon the Canadian law'. Lindley, as judge of first instance in this case, all the Judges in the Court of Appeals and all the noble Lords went on the law of Canada as they respectively understood it to be, although the owners of the pledged goods were an English house; thus disregarding the law of the owner's domicile".

(See also Dicey, "A Digest of the Law of England with reference to the Conflict of Laws." Fourth Edition, Chapter 24, page 574, *et seq.*)

In *Alcock* v. *Smith*, 1892, 1 C. H. (C. A.) 238, where the transfer of negotiable instruments was at issue, the Court per Kay, L. J., stated:

> "As to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the domicil of the owner, but upon the law of the country in which the transfer takes place."
>
> * * * * * * *
>
> "* * * there is another equally well-known rule of law, viz.: that a transfer of movable property duly carried out according to the law of the place where the property is situated is not rendered ineffectual by showing that such transfer as carried out, is not in accordance with what would be required by law in the country where its owner is domiciled."

See also:

*Maudslay, Sons & Field, In re* (1900), 1 Ch. 602;
*Swiss Bank Corp.* v. *Bolkmische Industrial Bank*, 1 K. B. (C. A.) 673;
The Jupiter (No. 3) (*supra*).

The State can always exercise through its courts jurisdiction over such intangible things as are localized within the State.

> "The Fourteenth Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a State possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property."
>
> *Pennington* v. *Fourth National Bank*, 243 U. S. 269, 271.

In *Harris* v. *Balk*, 198 U. S. 215, 222, the principle was stated as follows:

> "We do not see the materiality of the expression 'situs of the debt,' when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign State when therein sued upon his obligation by his creditor, as he was in the State where the debt was contracted."

In *Chicago, Rock Island, etc., Railway* v. *Sturm*, 174 U. S. 710, 716, Mr. Justice McKenna stated:

> "The proposition that the *situs* of a debt is where it is to be paid is indefinite. 'All debts are payable everywhere, unless there be some special limitation or provision in respect of payment; the rule being that debts as such have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere.' 2 Parsons on Contracts, 8th Edition 702."

While "maxim mobila sequuntur personam" is a governing rule in the case of succession, ab intestato, disposition by will, and marriage settlements, it has no application to the present case. The cases cited by the government on situs state the limitation imposed by the Supreme Court of the United States upon the exercise of jurisdiction to tax by the various States. "No case has extended, the principal by which the taxing power of the State has been limited to impose similar restrictions upon the exercise by the State of jurisdiction for any other purpose." (Restatement of the Law of Conflict of Laws, Section 50, Special Note.) See also: Westlake, "A Treatise on Private International Law" with principal reference to its practice in England. Seventh Edition, page 193, *et seq.*

The government contends that the property, *i. e.*, an amount due from an American National is located here for the purpose of construing the Litvinoff assignment, but is located in Russia for the purpose of interpreting the Confiscatory Decree.

> "Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one State, carries with it an implicit denial that there is a local situs in another State for the purpose of transferring the same thing there."
>
> *First National Bank* v. *Maine*, 284 U. S. 312, 326.

If both titles be examined, not independently, but as competing with one another, we have on the one hand:

> (a) The Manhattan Bank claiming by virtue of a transfer of property duly carried out according to the lex situs and the lex fori—which title grounded in American law is distinctly good;

and on the other hand

> (b) The United States asserting title based on a double transfer—the Soviet decree and the Litvinoff assignment. The Soviet decree was good according to the lex domicilii and the lex actus but distinctly bad according to the lex situs and lex fori and therefore the United States acquired nothing.

In addition to this the question of priorities, essentially a matter of procedure and governed by the lex fori, favors the Manhattan Bank.

> "Iowa may not say, however, that a liquidator with title who goes into Montana may set at naught Montana law as to the distribution of Montana assets, and carry into another State the rule of distribution prescribed by the statutes of the domicile."
>
> *Clark* v. *Williard, supra.*

In the interregnum between the establishment of a foreign government in power and its recognition by this government its decree is not entitled to any comity. During such period whatever has been done in our courts is not subject to attack and must be regarded as *res adjudicata* and valid against the world.

> *Rose* v. *Himely*, 4 Cranch. 241;
> *Gelston* v. *Hoyt*, 3 Wheat. 246.

The government asserts that the transfer is governed by Russian law. The courts do not take notice of foreign laws. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 445; *Hanley* v. *Donoghue*, 116 U. S. 1, 4; but the same must be pleaded and proved.

## II.

**The enforcement of the Soviet decree is repugnant to the policy of American law.**

### A.

Giving full effect to the decree under construction, it must, arguendo, be held to be a fiat or pronunciamento, the purpose of which is to arbitrarily dissolve Russian insurance corporations and allegedly confiscate or appropriate their property. The government so pleads (R. 3).

There is no pretense nor assertion by the petitioner that the means or method adopted by the Soviets followed due process of law or provided any method of adequate or other compensation to the corporation or its owners, or that the method of seizure is one consonant with our laws or known to American jurisprudence. It must be conceded that the result obtained by the Soviets is tantamount to the seizure of private property through the same methods pursued by lawless banditry.

No cases have been cited by the petitioner which satisfactorily indicate that our courts, Federal or State, will sustain a position that private rights can thus be annulled and property located in this country can be transferred to a Government located in another country in such an extraordinary fashion. It is, therefore, submitted that the very nature of the decree under review offends the background of our political and judicial institutions. The Northern Insurance Company of Moscow, having established a branch office in this country and located a fund here, is entitled to the full protection of our laws and the public policy underlying them.

In *Russian Reinsurance* v. *Stoddard*, 240 N. Y. 149, 163, the Court of Appeals said:

> "We give or deny the effect of law to decrees or acts of a foreign governmental establishment in accordance with our own public policy; we open or close our courts to foreign corporations according to our public policy, and in determining our public policy in these matters common sense and justice must be consideration of weight."

In *German-American Coffee Co.* v. *Diehl,* 216 N. Y. 57, 63, the same Court said:

> "As long as a foreign corporation keeps away from this state, it is not for us to say what it may do or not do. But when it comes into this state, and transacts business here, it must yield obedience to our laws. (Sinnott *v.* Hanan, 214 N. Y. 404, 548.) For many purposes the fiction of its residence in the state of its origin must then be disregarded. (Lockwood *v.* U. S. Steel Corp., 209 N. Y. 375, 385; St. Clair *v.* Cox; 106 U. S. 350, 355.)
>
> "* * * In these days, when countless corporations, organized on paper in neighboring states, live and move and have their being in New York, a sound public policy demands that our legislature be invested with the measure of control. * * * Even if the prohibited act is done in the home state, it may be so bound up in its results with the business in this state that we cannot view it with indifference."

The highest Court in Illinois stated in *Warren* v. *1st National Bank,* 149 Ill. 9, 25 L. R. A. 746:

> "It is the charter alone which, by the law of comity, is recognized and enforced in other jurisdictions and not the general legislation of the state in which the company is formed. The general laws and regulations of a state are intended to govern only within the limits of the state enacting them, and the state can have no power to give them extra-territorial force. Such provisions do not, as a rule,

> enter into contracts made within the state, if they are to be performed in another jurisdiction. It follows, therefore, that where a state statute is enacted for the enforcement of a local policy only it will not be presumed that such statutory provisions were intended by the state, to enter into the charter contract, and to regulate the company in its transactions outside of the state, and they will not affect the validity of the dealings of the company in foreign states. 2 Morawetz Priv. Corp. sec. 967."

To compel the defendant bank, the assignee of this corporation, to deliver the fund lawfully received by it upon the assertion of legality of this decree, which legality, it is claimed, comes through recognition of Russia by our Government, is plainly inconsistent with abstract justice, morals and equity. It is no answer to say that because of diplomatic recognition we have stamped approval upon the acts of a foreign country. All foreign laws of a penal or confiscatory nature are subject to review in our courts. Enforcement of decrees, legislation and orders of a friendly nation is frequent and not unusual, but there is, to our knowledge, no universal rule of application which compels such enforcement if the result is stultifying or obnoxious to our courts or so revolting that it transcends our conception of private rights in property located here.

In the instant case the rights of American nationals are involved as well as those of Russians. Moreover, included in the group of creditors who are entitled to the protection of American laws and who may rely upon American public policy with respect to penal statutes, are citizens of foreign friendly powers, *i. e.*, France, Germany, England, etc. Whatever may be the rights of the Soviets to legislate within their own territorial confines, it is unthinkable that a decree of the character here involved may annul vested rights of the creditors referred

to in a fund located here. This right would exist without prior judicial sanction. Here the creditors have been led by solemn utterances to believe that their rights were the subject of protection.

Great stress is laid by the petitioner on the retroactive effect of recognition. We seek no quarrel with the general application of this doctrine, but, like many doctrines of that character, it must bow to well recognized exceptions.

It has been intimated that the Executive Department by the acceptance of the assignment has declared the public policy of this country. That the Chief Executive may arbitrarily strip the Legislature and the Courts of any visitation or inquiry or examination on his acts in this connection is a heinous idea, and the decisions by no means support such a far-fetched suggestion. In *St. Louis Mining Co.* v. *Montana Mining Co.*, 171 U. S. 650, 655, the Court said:

> "The public policy of the Government is to be found in the Constitution and the laws, and the course of administration and decision. License Tax cases, 5 Wall. 462; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 340."

In *Huntington* v. *Attrill*, 146 U. S. 657, 675, this Court quoted with approval the following pertinent language from the case of *Higgins* v. *Central New England R. Co.*, 155 Mass. 180:

> "These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do sub-

> stantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this State or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction."

The New York Court of Appeals considered the effect of Soviet decrees after recognition in *Vladikavkazsky Ry. Co.* v. *New York Trust Company*, 263 N. Y. 369. In that case the plaintiff brought an action to recover a deposit of funds in the New York office of the defendant banking institution. The property was located here. It was argued by the defendant company that the Russian railway company was dissolved by the ukase or legislation of the Soviets. The defendant bank contended that whatever notions or views the Court of Appeals may have entertained before recognition, it was bound to enforce the decree of confiscation and dissolution as a matter of comity. This contention, the same as that asserted by the Government in this case, received short shrift in the opinion rejecting it (p. 378):

> "It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees, *is contrary to our public policy and shocking to our sense of justice and equity.* That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts. (*Baglin* v. *Cusenier*, 221 U. S. 580.)
>
> "We enforce the same principle even in regard to statutes of sister States. (*Barth* v. *Backus*, 140 N. Y. 230, 239.)

> "The fact that the present Russian government was not recognized was not the basis of our refusal to give effect to its decrees nationalizing corporations and confiscating their property. During the period when those decisions were made, we recognized and enforced 'mere ordinary legislation' relating to 'every day transactions of business or domestic life.' (*Petrogradsky M. K. Bank* v. *National City Bank*, supra; *Matter of People* (*First Russian Ins. Co.*, 255 N. Y. 428, 432.)
>
> "Prior to recognition we clearly intimated that our decision would have been the same if at the time recognition had been granted. (*James & Co.* v. *Second Russian Insurance Co.*, 239 N. Y. 248, 257.)"

Other cases, such as *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *Ritter* v. *U. S.*, 28 Fed. (2nd) 265; *Walker* v. *U. S.*, 139 Fed. 409, and *Cook, et al.* v. *U. S.*, 91 U. S. 389, all support the doctrine that legislation or contracts which conflict with our concepts of right and justice will be rejected and will not be enforced by our courts.

In *United States* v. *Juan Percheman*, 7 Peters 51, 86, 8 L. Ed. 604, this Court said:

> "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled."

We submit that where a foreign law seizes or attempts to seize private property located in this country, there is an immediate conflict not only with our own public policy but,

moreover, an invasion of the constitutional rights of those who have title to the property in this country or who are entitled to some interest therein.

Even Circuit Judge Manton, in his dissenting opinion in the Court below, gave recognition to a fundamental principle of our Government and courts when he said:

> "* * * The public policy of the country may be declared in our Constitution."

We submit that the Constitution by its very language has very specifically and unequivocally indicated that to enforce this decree would be contrary to constitutional guarantees.

Amendment V—the so-called "Bill of Rights"—which became law and part of the original Constitution on December 15th, 1791, reads, in fine:

> *"Nor shall property be taken for public use without just compensation."*

Where the Constitution, as here, clearly prohibits certain acts which, from their nature, may be imputed either to the individual or to any of the three departments of the Nation, no such act, nor any consequence thereof, may be tolerated by the courts—the guardians of the Constitution —still less may they condone acts of the Executive based on such prohibited act.

The strict prohibition applies to all three departments: thus, the Executive cannot take private property without just compensation, be it through the intervention of the armed force placed at its disposal by the Constitution, or through the exercise of the treaty-making power which it shares with the Legislative; neither may the Legislative do it by statute; nor may courts adjudicate to that effect and

purpose, nor condone any prohibited acts by whomsoever performed.

And it is inconceivable that, while prohibiting an act, the Constitution should tolerate its indirect performance, or its consequences. The Constitution, if anything, is the basic declaration of the public policy of the Nation, of those principles by and through which the people of the United States willed to be governed and under the sway of which they have expressed their unequivocal intention to live.

It is not conceivable, we say, that, to take an example, the people of the United States, when enacting the XVIII Amendment, would have allowed their Executive to carry on liquor-trade abroad, or, when enacting the XIII Amendment (abolition of slavery), would have tolerated their Executive to exploit slaves in Brazil.

In the same manner let it not be said that the Constitution has nothing to do with the exercise by the Executive of certain proprietory rights which it alleges to have acquired from a foreign sovereign State, not bound by the V Amendment. It is a commonplace of jurisprudence that a right cannot be based on an injustice and that obvious principle, if anything, has a stronger binding force on the Executive who represents the whole Nation than on a private individual.

Nor may it be said that no actual injustice will be done if the Court recognizes and enforces a title based on injustice in this one specific case. Private interests are at stake and private interests will be injured if this Court—the supreme guardian of the Constitution—should set its seal to acts of spoliation performed in flagrant violation of the Constitution. When even once a private right is sacrificed in deference to the Executive, there is no limit to the application of the exception.

**B.**

**The French courts have held the decrees to be directly opposed to French public policy.**

The views of the English courts have been shown and demonstrated under an earlier point. The French courts have uniformly resented and declined to enforce decrees of spoliation and plunder. Their decisions are entitled to weight and reference.

The first important decision rendered by a French Court after recognition of the Soviet Government in 1924 is one by the Aix Court of Appeal in *Etat Russe c. Ropit,* Aix, 23,12.25; 53 Clunet 667. This was an action by the Soviet Government to recover a fleet of steamships belonging to "Ropit", a nationalized Russian Company. The claim was dismissed.

The French Court said:

> "Whereas the appellant claims to justify his action through the act of recognition *de jure* of the Soviet Government by the Government of the French Republic, such recognition being alleged to entail the applicability to Russian subjects, even before foreign jurisdictions, of the legislation initiated by them in 1918; Whereas the resumption of diplomatic relations between France and Russia did not, and could not, have such a general bearing; that it is not admissible to maintain that the French State through the *de jure* recognition of the Soviet Government has *ipso facto* agreed not to reject such legal enactments as might appear to him /the French State/ contrary to his own concept of the national public order; * * * That, while the recognition does not permit any more to the French Judge to ignore Soviet law and to reject it systematically as a whole, it does not prevent him from examining in each case the letter and the spirit thereof, nor from denying it any legal

effect if he considers it injurious to the essential principles of the political and social structure of France. Now, whereas the Soviet decree nationalizing property in Russia,—even such as belongs to foreigners,—the owners thereof not receiving a previous and just compensation, is plain and unalloyed confiscation, a *coup de force* of the State against the individual, with the purpose of abolishing,—according to the very terms of the Constitution of the U. S. S. R.,—private property and of establishing the dictature of the prolétariat; **that such legislation offends the very basis of the French juridical structure which rests on the respect for property and for the inviolability of the rights property gives birth to; that it can, therefore, be neither directly nor indirectly applied before a French Court * * *"**

That decision was affirmed by the Supreme Court of France—the Cour de Cassation—*Etat Russe c. Ropit*, Cass. (Req.), 5.3.28; 55 Clunet 674; from which we quote the following passages:

"Whereas, while in principle the Courts of a State, when asked to examine a legal set of facts which arose under a foreign legislation, are bound to do so applying foreign law, that rule binds them insofar only as the application of the foreign law, or the respect due to rights acquired under such law, does not interfere with the principles or stipulations of their national law considered as essential for the public order; Whereas, according to Article 545 of the *Code Civil*, no one in France may be compelled to surrender his property, unless it be for public use and in consideration for a just and previous compensation; that this rule, inserted in our Codes and asserted in our successive Constitutions, is one of the fundamental bases of our social institutions; that it cannot be made to yield before the stipulations of foreign legislation without profoundly dis-

turbing the order established on the territory of the Republic; And whereas the Soviet decree of 26th. January, 1918, declares the nationalization of the Russian commercial fleet without providing that a previous and just compensation shall be awarded to the dispossessed owners; that said decree institutes thereby a mode of acquisition of property which cannot be recognized by French Tribunals * * *".

In *Vairon & Cie c. Banque de Commerce de Sibérie*, Bordeaux, 2.1.28; Gazette du Palais 22.5.28; the Bordeaux Court of Appeal drew a line between those provisions of Soviet legislation which were, and those which were not, contrary to French public order. It held that the dissolution of corporations had nothing objectionable in it *per se*, and could not be ignored, but that confiscation was radically incompatible with the fundamental principles of French Law:

"Whereas * * * on 28th. October 1928 the French Government recognized the U. S. S. R.; that it follows that the French judicial authority cannot henceforward consider as non-existent as a whole the entire new Russian legislation; but that in case of litigation between private parties where French law is opposed to Russian law the conflict must be resolved according to the rules of Private International Law; Whereas, of course, Russian legislation cannot be forced upon French Tribunals whenever it is incompatible with the French public order; that in that respect the plain and unalloyed nationalization of banks without compensation is directly opposed to essential principles of French public law based on the irrevocable nature of the right of ownership; That it is none the less a fact that Russian banks have ceased to exist; that that abolition, considered in itself, and apart from the confiscation which followed it, is not in contradiction with French law * * *".

That decision was affirmed on appeal, Cass. (Req.), 29.7.29; 57 Clunet 690.

The same principles, in similar terms, have since been invariably applied with regard to Soviet decrees nationalizing Russian corporations and confiscating their assets (see, *e. g.: Nord de Moscou c. Union & Phoenix Espagnol*, Paris, 13.6.28; 56 Clunet 112; *Crédit d'Anvers c. Crédit Lyonnais*, Cass., 25.2.29; 56 Clunet 1306; *Cockerill c. Union & Phoenix Espagnol*, Paris, 23.12.30; 58 Clunet 403; *Vve Lalande c. Banque Russe pour le Commerce Etranger*, Trib. Com. Seine, 29.6.32; 61 Clunet 668; *Société Wildenberg c. Comptoir National d'Escompte de Paris*, Trib. Com. Seine, 15.1.34; 61 Clunet 657).

The decisions were not different, nor were they differently grounded when the Courts had to examine the application to Russian nationals of other Soviet decrees of a similar confiscatory nature.

Thus, in *Bessel c. Société des Auteurs et Compositeurs Dramatiques*, Trib. Civ. Seine, 14.2.31; 59 Clunet 113; it was held that the Soviet decree abolishing copyright could not be applied by the French Courts:

> "Whereas moreover the Soviet law of 26th. November 1918 cannot be applied in France, inasmuch as Courts can apply foreign laws only so long as such application is not injurious to the principles and stipulations of their national laws considered as essential for the public order. Whereas said law of 26th. November 1918 institutes in favour of the State a mode of acquisition of property which cannot be recognized by French Courts * * *".

and in *Dame Wiesbein c. Chabrol*, Trib. Civ. Seine, 18.2.32; 59 Clunet 444; it was held that the Soviet decree limiting to an amount of 10.000 roubles the right of succession could not be applied:

"Whereas such confiscation is contrary to the French public order and cannot be held valid and effective in this country * * *".

It is apparent therefore that every court which has examined these decrees has held them to be an affront to justice and of no extra territorial force. It has always been the primary policy of our courts, in preserving an energetic and correct tone of morals, to reject unjust and arbitrary laws. In consequence of this principle neither foreign nor domestic usurpation flourishes on our soil.

## III.

**The language of the Litvinoff letter does not include a claim against the respondent.**

### A.

Long prior to the exchange of correspondence between our government and Russia, the *res* had been transferred within the sovereignty having jurisdiction of the same to the assignee for the benefit of creditors. The assignment passed title eo instanti to all the property involved. *Crapo* v. *Kelly*, 16 Wall. 610. This transfer took place at a time when the power of the corporation here to do so was established.

The title to the property having been determined by the New York courts, that title travels with the thing in all its future progress. *Rose* v. *Himely*, 4 Cranch. 241; *Gelston* v. *Hoyt*, 3 Wheat. 248.

That part of Litvinoff's letter pertinent to the issues here can be found in the following wording:

"agrees that * * * the Government * * * will not * * * initiate any new litigations for

> the amounts admitted to be due or that may be found to be due it as the successor of prior Governments of Russia or otherwise, from American nationals * * * and does hereby release and assign all such amounts to the Government of the United States * * *".

This Court, before it can sustain the position of the complainant, must find that the money presently in the custody of the defendant Bank is either an amount admitted to be due, or that may be found to be due the Soviet Government. It certainly is not contended by the Government that there is any amount *admitted to be due* by the defendant Bank to the Soviet; therefore, it remains to be seen whether there is any amount *that may be found due* by the defendant to the Soviet Government and, in turn, to the complainant as the assignee of that Government.

It is elementary, of course, that the complainant gets no greater rights under the so-called letter of assignment than the Soviet had (*United States* v. *Buford, supra*). It further follows that the rights of the complainant are to be decided and governed by the relationship, whether factual or resulting by operation of law, existing between the assignor of the Soviet Government and the defendant.

It must be conceded, and we assume will be admitted, that the Bank had no dealings nor contractual obligations with the Soviet Government. There was never at any time any relationship of debtor and creditor between the Soviet Government and the defendant Bank.

Nor was there ever any such relation between the Northern and the defendant Bank. The assignee traces its title back to the Northern and it certainly cannot be seriously argued that there is any amount due from the bank to the Northern, or any amount which could be found due from the bank to the Northern. The defendant Bank is

not a debtor of the Northern, and never has been. The implication which necessarily flows from the language of Litvinoff's letter is that there is a debt owing by an American National. There is nothing owed by the defendant Bank, an American National.

The Government mistakes the intention of the letter. Clearly, if the defendant bank had received the funds of the Northern as a deposit there might be some force in the argument that a relationship of debtor and creditor existed between the Northern and the defendant bank, but to hold under Litvinoff's letter that an assignee for the benefit of creditors owes an amount to the Soviet Government is to give it an unnatural interpretation and one that its language and wording were never intended to convey. While the defendant functions under the Debtor and Creditor Law, the debtor referred to in the title of the Act is obviously the *assignor,* and not the assignee.

The word "due", used in the sense that it was used in this letter, obviously imports a debt or something owed by the American National. We have clearly shown that nothing was ever owed by the bank, either to the Northern or to the Soviet Government. The fund in the hands of the defendant Bank belonged to the Northern Insurance Company subject to the claims of creditors and stockholders. This Court, before it can sustain the government's position, will necessarily be obligated to decide that a debt is owing by the bank and we respectfully submit upon this record that this cannot be done.

The word "due" has been the subject of judicial definition.

In *Feeser* v. *Feeser,* 15 Atl. 406, it was defined generally to be "that which is owed".

In *Rutez* v. *Sagamore Valley Mutual Fire Ins. Co.,* 94 N. W. 191, the word was construed to indicate a debt.

In *Yocum* v. *Allen*, 5 N. E. 909, it was held that the word imported a debt matured.

In the *U. S.* v. *Bank of North Carolina*, 31 U. S. 29, it was held that in its primary sense the word "due" means "owing".

The word "due" is derived from the French verb "devoir", meaning "to owe", and from the Latin "debere", meaning the same.

In Webster's New International Dictionary of the English Language, the word is defined as "owed or owing; as a debt; of the nature of a financial obligation; that which is due or owed; debt; that which one contracts to pay; * * *."

In Webster's Daily Use Dictionary the word "due" is defined as "owed or owing; payable".

From the foregoing, it is therefore quite apparent that what was intended by the letter was the assignment of a debt due, but not some nebulous claim.

If this matter was sought to be governed by the letter, or if this particular situation was contemplated by the respective governments, it was a simple enough matter to have inserted an express provision in the letter covering the situation we are dealing with here.

This was done in the case of the claim of the Russian Volunteer Fleet. We all know that recognition did not occur overnight, but was the subject of tedious and prolonged negotiation between the two governments. Ample opportunity was present for careful and deliberate wording and since the Litvinoff letter excludes any claim against this defendant, there is no reason nor justification for interpolating it by giving the letter a peculiar construction or one contrary to its intended phraseology.

B.

**Only property remaining after liquidation passes to the Soviets.**

The Government claims, however, that the correspondence does cover the funds in question because the Northern Insurance Company in New York held the funds for the Soviet Government, as successor to the dissolved corporation and that this obligation is equally binding on the Bank, as assignee. There is no debt owing by the Northern Insurance Company in this jurisdiction to the Soviets which its assignee is obligated to pay.

Of course the agreement transferred nothing to which the sovereign had no right of property. *Mitchel* v. *United States*, 9 Pet. 711. A proper interpretation of the decree shows that only "after" liquidation does title vest in the Soviets, hence the attempted assignment and the present action are premature.

A translation of the decree will be found at pages 8, 35 and 36 of the record, but the Court will observe in the affidavits of Russian experts, submitted in opposition to the Government's case, that there is a sharp conflict with respect to the correctness of the translation. In fact, one marked and important sentence is admitted to have been erroneously interpreted, or, as stated in the letter of the Department of State, "inadvertently" omitted (R. 34); (affidavits of Valentin Glasberg, R. 30, 31; and William G. Welliaminoff, R. 37, 38).

It will be noted that the decree shows a very marked distinction between public and private insurance corporations:

> "(a) *private* insurance organizations,—the Northern being one of them,—are made subject to *liquidation*, i. e., must be wound-up by the ordinary process

entailing in the first place the discharge of their liabilities;

"(b) public insurance organizations,—municipal and rural,—are directly proclaimed *the property of, and title to their assets* is forthwith vested in, the State."

Should the language used in article 2 of the decree in making the distinction between private and public insurance organizations and in defining the different treatment meted out to them present any doubt whatever, the same will be dispelled if one examines closely the "Note" to article 3 of the decree.

This "Note" has been mistranslated in the exhibit to the U. S. affidavit. That translation reads: "The same Commission is charged with the liquidating of private insurance organizations, all property and assets of which, *disclosed* at *the time of their liquidation,* become the property of the R. S. F. S. R." (R. 9). The italicized words do not accurately translate the Russian text. The Russian means clearly: "*disclosed* (or: *which will be left over*) AFTER their liquidation."

Such a translation of the decree finds judicial support in *Perry* v. *Equitable Life Assurance Society,* 45 T.L.R. K. B. 1929), where Mr. Justice Branson at Kings Bench said:

"The first question of Russian Law is as to the effect of the monopolization decree made on November 28, 1918, and published in December of that year. The decree is perfectly general in its terms. Insurance in all its form is declared a state monopoly and all private insurance companies and organizations (bond shareholders and mutual) are to be *liquidated and their entire property remaining after liquidation is to pass to the State.*"

If the purport of the decree had been to vest title in the Soviets to all its assets, then no purpose would be served by distinguishing between public and private insurance organizations and by providing for these latter that only such assets as may remain *after* the liquidation shall become the property of the State.

In whatever light the correspondence is viewed it will be observed that there is no amount due from an American National.

## C.

**The interpretation adopted by sovereign parties should not be controlling where private rights are at stake.**

"No construction of a treaty which would impair that security to private property which the laws and usages of nations could confer without express stipulation is admissible further than its positive words require." *Strother* v. *Lucas*, 12 Pet. 410, 438; *The U. S.* v. *Reynes*, 9 How. 127.

It is true that the courts are bound by the executive department's pronouncement that a treaty or an assignment has been made or accepted. Similarly the parties here could not question that recognition had been granted to the Soviet Government. It cannot be established, however, that the Court is denied the right to interpret an executive agreement, a document of lesser dignity than a treaty, when the courts are replete with decisions covering the interpretations of treaties and construing their language.

"The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty

itself." *Jones* v. *Meehan*, 175 U. S. 1, Moore, International Law Digest, 1906, Vol. 5, Section 760, page 234, *et seq.*

"M. d'Argaiz seems to think that a treaty stipulation cannot be subjected to the interpretation of the judicial authority, and proceeds to remark that, 'if the courts of the Union possess the right of interpreting, considering, and deciding upon treaties contracted between nation and nation, and the executive power cannot inquire whether their decrees are or are not conformable with justice, it would be as well to declare that in order to give to treaties the force of treaties, or, at least, to render them obligatory, they should be concluded with the judicial power, or, in better words, that treaties should be made, for them to be afterward interpreted as the courts might think proper.' But the undersigned supposes that nothing is more common, in countries where the judiciary is an independent branch of the government, than for questions arising under treaties to be submitted to its decision. Indeed, in all regular governments, questions of private right, arising under treaty stipulations are in their nature judicial questions. With us a treaty is part of the supreme law of the land; as such, it influences and controls the decisions of all tribunals; and many instances might be quoted of decisions made in the Supreme Court of the United States, arising under their several treaties with Spain herself, as well as under treaties between the United States and other nations. Similar instances of judicial decisions on points arising under treaties may be found in the history of France, England and other nations; and, indeed, the undersigned would take the liberty to remind the Chevalier d'Argaiz that this very treaty of 1795 has been made the subject of judicial decision by a Spanish tribunal.

"The undersigned would call to the recollection of the Chevalier d'Argaiz the case of Mr. D. Hareng, in which the Spanish colonial courts decided accord-

ing to their sense of the intention of the treaty of 1795, and the intendant confirmed their decree, which was, that nothing in that treaty exempted Mr. Hareng from the payment of certain demands. From this decision this government was inclined to dissent, but never questioned the right and duty of a Spanish court to consider the intent and effect of a treaty."

Mr. Webster, Sec. of State, to the Chev. d'Argaiz, Span. min., June 21, 1842, relating to the case of the Amistad, Webster's Works, VI. 399, 400. Moore, International Law Digest, 1906, Vol. 5, page 236, *et seq.*

It has never been doubted that our American form of democratic government operates as a government of laws and maintains its balance under the system of the separation of the executive, legislative and judicial departments. The statement in the Government's brief and the dissenting opinion of Judge Manton below to the effect that an assignment should be considered as liberally as the exigencies of the case may demand, might be true if it were strictly limited to a stipulation involving solely mutual relations of states in their sovereign capacity, *i. e., jure imperii.* Such questions as is well known are exclusively governed by the principles of international law. They escape as such the jurisdiction of municipal courts, and in the absence of submission to international tribunals are the subject-matter for diplomatic negotiations and in the last resort for war.

But it is a commonplace of legal science that municipal courts not only have the right but the duty to interpret an international instrument, when such international instrument concerns private rights, and in so doing, they are bound by rules of strict interpretation with regard to stipulations in such international instruments involving

private interests. The primary duty of the Courts is the protection of private rights. Thus no infringement of a private right will be tolerated, unless an unequivocal stipulation in the instrument is subject to that interpretation. The presumption is always in favor of the individual. This is all the more so when a relevant provision of the international instrument subject to interpretation has been made by the states not in their sovereign capacity, but in their private one—*jure negotii*. That that is so the prevailing opinion in the court below has held: "Though sovereign powers have been dealing with each other they have been dealing *in private causes of action*".

No foreign law is ever applicable as of right, but such application is always a gracious act on the part of the sovereign represented by its court.

"The application of foreign law is not a matter of caprice or option, it does not arise from the desire of the sovereign of England or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants whether native or foreigners." Dicey, "A Digest of the Law of England", with Reference to the Conflict of Laws, Fourth Edition, page 9, *et seq.*

An executive agreement like a treaty should be construed in accordance with the state of things at the time existing. *Strother* v. *Lucas*, 12 Pet. 410. At the time the Litvinoff assignment was made the fund in suit was under the jurisdiction of the Supreme Court of the State of New York and subject to the claims of creditors who had filed their claims in that proceeding. The United States was, as a result, bound by the pendency of the New York State Court action and the proceedings that had taken place therein, and the existence and approval of prior claims filed against the fund in the possession of the State Court.

Property acquired by treaty is subject so far as concerns titles to property and prior rights of status, to the same law as it was subject to before the transfer. *United States* v. *Moreno*, 1 Wall. 400.

D.

**The executive agreement is ineffective to destroy individual rights.**

The assignment relied on by the complainant is one conditional in its nature and of limited duration. The language of the letter of November 16, 1933, states in effect that the Soviet Government obligated itself not "to initiate any new litigation for amounts * * * that may be found to be due it" and "does hereby release and assign all such amounts to the Government of the United States" but this only "preparatory to a final settlement of the claims and counterclaims between the Governments of the United Soviet States of Russia and the United States of America * * *". In other words, this was only a preliminary arrangement anticipating a final settlement and premised on the consummation of pending negotiations. Secretary of State Hull's recent communique issued at the State Department on January 31, 1935, contains the following pronouncement: "In view of the present attitude of the Soviet Government, I feel that we cannot encourage the hope that any agreement is now possible. * * * There seems to be scarcely any reason to doubt that the negotiations which seemed so promising at the start must now be regarded as having come to an end."

If, indeed, the official of this country in charge of such matters clearly states that negotiations are decidedly concluded, what force can the agreement have?

The assignment in question is an executive agreement not a treaty. It is an arrangement to effect the purposes more usually accomplished by the more complex machinery of treaties.

A treaty is ineffective to operate on individual rights until ratified.

*Haver* v. *Yaker*, 9 Wall. 32;
*Montault, et al.* v. *The U. S.*, 12 How. 47;
*United States* v. *Arredondo*, 6 Peters 691.

In *Haver* v. *Yaker* (*supra*), the court stated (p. 34):

"It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in Arredondo's case, reported in 6th Peters. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to have him bound by it, as the law of the land,

until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned."

The Government has cited Vol. 78 of the Congressional Record, pages 460-461 of Proceedings before the Senate on January 11, 1934, and has made the broad statement that our legislative branch of the government has tacitly approved the declaration of a policy adopted by the President of the United States in his recognition of Russia. The inference necessarily flows from the statement of the Solicitor General that our Senate has lent support to the methods of lawlessness and piracy pursued by the Soviets. An examination of the Congressional Record in the volume referred to discloses that all the Senate had before it on the occasion we are referring to was the submission for confirmation of the nomination of one W. C. Bullitt as the diplomatic representative of the United States in Russia. In place of any tacit approval of the so-called public policy enunciated by our highest Executive, there was instead the most severe condemnation of the methods and practices of the Government whose decree is now before us. The footnote will disclose some of the speeches made by our senatorial representatives, in which it is disclosed that their own knowledge of recognition was not official but derived from newspaper reports, and, moreover, that they accepted the protestations and assurances of the Soviets that there would be good faith behind their promises with considerable doubt. It will be noted that there were references by Senator Robinson to the rather distressing and unfortunate experience of other great nations of the world who had

**recognized this country, *i. e.*, Great Britain, France, Italy, China and Japan.***

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*Jan. 11, p. 460:

Mr. Vandenberg: My motion sought the full official information respecting the arrangement which has been entered into governing the contracts and the warrants which were to exist between these two countries. The only information heretofore available to the Congress on the subject, the only information available to the Committee on Foreign Relations, has been the casual information given in the newspapers. It would not seem to me appropriate that in a matter of this long standing and often bitter controversy, and in a matter of this major importance in the opinion of many of the American people, that the Senate and the Foreign Relations Committee should be guided solely by what they had seen in the public prints.

P. 461:

Mr. Vandenberg: The Senate has partnership responsibility with the Executive for our foreign relations, and complete mutual information is at all times desirable, but there are some things that cannot be rubber-stamped, no matter what our faith.

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Mr. Vandenberg: * * * The reason fundamentally that I have opposed the recognition of Russia is that we, too, have a right to elect our own form of government without any outside interference, and so long as the Russian government was engaged in subversive propaganda officially or semi-officially, directed from Moscow in any degree—propaganda aimed at the destruction of our form of government within our own United States—that we had no justification whatsoever in governmental philosophy or ethics or international fair play to accept on the basis of common partnership and parity in the family of nations, an institution of that obnoxious character.

P. 468:

Mr. Vandenberg: I concede that the recognition of Russia is exclusively an Executive function and prerogative, and we cannot pass on it even if we would. The President has acted in his own right and the decision is beyond our recall. That question is not before us. To be sure, we could decline the confirmation of the ambassador and then we could decline the confirmation of his successor if such were our wish; but this would not affect the fact of recognition, and we would be in the anomalous position of not having a representative of our own to guard our interests in Moscow but of having a representative of Moscow in the United States. * * * Therefore it seems to me, in the sheer logic of the case as I argue it out to myself and to the Senate, that the act of recognition is complete, it is not a matter upon which the Senate can pass. If the Senate were passing upon that, I am not clear that even now, in the face of these warrants, I would be satisfied to vote in the affirmative.

Mr. Robinson: * * * I shall oppose the confirmation of Mr. Bullitt for two reasons: first in order to express my protest and opposition against Russian recognition in any form; * * *

P. 470:

Mr. Robinson: Another reason is that mentioned by the very able Senator from Michigan: the fact that communistic propaganda is widespread in this country, emanating from Moscow; and no matter what promises they may make, Mr. President, the fact remains that they have not kept their word with any country during the past ten years.

The experiences of Great Britain, and of France, and of Italy and of China, and Japan, and of the United States—all are in the same direction. They do

As a matter of fact, even if Federal legislation had approved or ratified this executive arrangement of recognition entered into between our President and Litvinoff, nevertheless we submit that such ratification or approval would be wholly ineffective to destroy or impair the property rights which have already vested and which have been fully recognized by the New York courts. It may be observed in passing that the creditors whose rights were so seriously considered by the New York Court of Appeals, relying upon and acting pursuant to the directions of that Court, after the deed of assignment for the benefit of creditors was filed by the Northern Insurance Company of Moscow in favor of the present defendant, formally lodged their claims with the assignee. A number of these claims, after investigation and submission to the assignee and the referee appointed by the court to pass upon their propriety and merit, were approved in a formal report filed in the New York Supreme Court by the referee. Orders were entered by the Court approving and confirming the report of the referee and directing payment to the creditors by the assignee, and obviously such claims stand on a parity with judgments.

In the present case, not only is the title of the assignee at stake, but the United States Government is attempting

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not keep their word. Indeed within the last year one of their most powerful leaders has made the statement that they reserve the right to repudiate their word whenever it suits them or their interests to do so. "Sign anything", they say, in effect, "in order to get advantages for us, but let it be understood that we will repudiate our word and our signature whenever we see fit to do so."

Pp. 470-1:

Mr. Robinson: Mr. President, that is all I have to say on the subject, I want to make it clear that I am opposed to Russian recognition in any form. While I have no better means of knowing how the people feel about it than any other Senator, it is my opinion that the great majority of the American people are opposed to Russian recognition, that if a vote were to be taken on it throughout the country it would result overwhelmingly against any such recognition. Now that recognition has been accorded, however, by the Chief Executive, it remains for this body to express itself in the only manner it can; that is by a vote on the confirmation of Mr. Bullitt.

to seize a fund, which is subject to decrees directing payment by the courts of the State of New York to certain individual creditors. It would be a violation of public faith to deprive those individuals of their existing rights, which have accrued in the State Court proceedings.

## IV.

**The Federal Court will not interfere with a proceeding properly pending in a State Court.**

### A.

In *Pennoyer* v. *Neff*, 95 U. S. 714, 734, the court states: "It is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein."

By the institution of this action the Government is seeking to promote the rather disturbing spectacle of two courts fighting over the administration of a fund. Fortunately, the courts long ago ruled that the court first acquiring jurisdiction of the *res* continues to administer it. There is now pending an orderly proceeding for the distribution of the Northern's assets to its creditors and stockholders. The Government has been invited to come into this proceeding and file its claim, but it has steadfastly remained aloof, asserting, in effect, that it intends to liquidate this fund according to its own ideas and according to its own judgment as to who or who are not creditors, lienors and claimants. In other words, the pronouncement of the Court of Appeals that the fund is to remain intact in the

State Court for appropriate administration is to be rendered nugatory and ineffective merely because the Government has the belief and idea that a better or a different administration might be conducted and perfected in the Federal Court. If this argument is sustained, it may result and could easily result in repeated clashes of jurisdiction between the State and Federal Courts and the odious result of the two courts at constant odds over which forum was to be used.

The possession of the fund has always been, since the commencement of liquidation, in the State Court which is one of competent jurisdiction. It has been held that under such circumstances such possession will not be disturbed by process out of another court.

*Byers* v. *McAuley*, 149 U. S. 608;
*Covell* v. *Heyman*, 111 U. S. 176;
*Ellis* v. *Davis*, 109 U. S. 485;
*Krippendorf* v. *Hyde*, 110 U. S. 276;
*Borer* v. *Chapman*, 119 U. S. 587.

In *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, this Court held that a Federal Court cannot by appointment of a receiver take the property in controversy out of the possession of a receiver appointed by a State Court before the Federal Action is begun and enjoin action on its part where the State Court had jurisdiction of the parties and subject-matter. The Court said:

> "What the Federal Court undertook to do was not to adjudicate rights in personam (Citing cases), but to take the res out of the possession and control of the State Court, and to enjoin all action on its part, except as directed by the Federal Court for Minnesota.
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> * * * * * * *

"Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts."

In *Palmer* v. *Texas*, 212 U. S. 118, 129, Mr. Justice Day stated:

"We think the law of this court is well established to be that jurisdiction over the property was acquired by the state courts when the receiver was appointed, the judicial process served, and the receiver duly qualified, although the state receiver had not taken actual possession of the property. This principle was recognized in Farmers' Loan & Trust Co. *v.* Lake Street Electric Rwy. Co., 177 U. S. 51, 61, in which this court said:

"The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and, for the time being, disables other courts of co-ordinate jurisdiction from exercising like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdictions embrace the same subjects and persons. *Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, to administer trust or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.* The rule has been declared to be of especial importance in its application to Federal and state courts. Peck *v.* Jenness, 7 How. 612; Freeman *v.* Howe, 24 How. 450; Moran *v.* Sturges, 154 U. S. 256;

> Central National Bank *v.* Stevens, 169 U. S. 432; Harkrader *v.* Wadley, 172 U. S. 148."

In the present case the United States is asking for an adjudication of title and of the right to possession of the fund over which the State Court has acquired jurisdiction. It is impossible to conceive how the title of the United States, if it were adjudicated to have one, could be enforced without invading the State Court's jurisdiction over the fund. In some part of the Federal Court proceeding it would become necessary for that Court to seize and exercise dominion over the property. There would then be a conflict between the courts as to which one of them was entitled to possession over the res; for on the one hand the State Court would be seeking to protect the creditors who were armed with legal process and were proceeding against the fund, and on the other hand the Federal Court would be attempting to apply the entire fund in satisfaction of the Government's claim.

In *Matter of Sheldon*, 173 N. Y. 287, the Court of Appeals clarified the nature of an assignment proceeding. It was said:

> "I think in the light of these decisions it must be considered that under the present law *the conversion, disposition and distribution of an assigned estate constitutes from the recording of the assignment a proceeding in court* and that the administration of the estate, though made by the assignee, who, in the first instance at least, is selected by the assignor, is really made by the court under the power granted it by statute to control such administration."

The construction and effect of a state statute regulating assignments for the benefit of creditors is a question on which the decisions of the highest court of the state are controlling in the courts of the United States. *May* v.

*Tenney*, 148 U. S. 60; *South Branch Lumber Co. v. Ott*, 142 U. S. 622; *Union Nat. Bank of Chicago* v. *Bank of Kansas City*, 136 U. S. 223; *Jencks* v. *Quidnick Co.*, 135 U. S. 457.

In 1914, the New York Legislature defined the status of the proceeding in question here.

Section 20 of the Debtor and Creditor Law provides:

> "Sec. 20. General Powers of Court.—Any proceeding under this article shall be deemed for all purposes, including review by appeal or otherwise, to be a proceeding had in the court as a court of general jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors, and jurisdiction shall be presumed in support of the orders and decrees therein unless the contrary be shown; and after the filing or recording of an assignment under this article, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein."

**B.**

**The Federal Court has not exclusive jurisdiction of the matters asserted in the complaint.**

In *Ritter* v. *U. S.*, 28 Fed. 2nd 265, the court said:

> "When a sovereign becomes an actor in a Court of Justice, its rights must be determined on those fixed principles of justice which govern between man and man in like circumstances."

Section 24 of the Judicial Code as amended, c-231, 36 stat. 1087, 1091 (U. S. C., Title 28, Sec. 41), speaks of original jurisdiction only. The words quoted do not of themselves and without more exclude the jurisdiction of the State Court. The State Court is only excluded from juris-

diction where a statute expressly grants such jurisdiction to the courts of the United States exclusively.

Section 256 of the Judicial Code, U. S. C., Section 371, sets forth when the United States Courts shall have exclusive jurisdiction as distinguished from original jurisdiction. There is nothing in that section which expressly grants to the federal court exclusive jurisdiction over suits where the United States is a party. In this respect it stands in no better position than a private litigant.

In the case of *Merryweather* v. *United States*, 12 Fed. 2d 407, 409, Circuit Judge Hunt said:

> "While the United States Courts have original jurisdiction of suits at common law or in equity wherein the United States is plaintiff, such jurisdiction is not exclusive. Interpretations of the Constitution settled that point many years ago. In Plaquemines Fruit Co. *v.* Henderson, 170 U. S. 511, it was held that the words 'Judicial power', used in Section 1 of Article III of the Constitution, do not withdraw the States' authority to determine by their courts all cases and controversies to which the judicial power of the United States was extended and of which jurisdiction was not given to the National courts exclusively."

The Government's suit is an action *in rem*. It must be conceded that the original proceeding brought by the Northern Insurance Company in the State Court, the purpose and effect of which was a distribution of the insurance company's assets among its creditors, was a proceeding *in rem*. The Government's claim is also *in rem* for what it seeks is a judgment against the funds of the Northern Insurance Company in control and possession of the Bank.

The relief sought by the United States to obtain a stay of the State Court proceeding is expressly prohibited by Section 265 of the Judicial Code:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The provisions contained in this section cannot be violated even by the United States. (United States *v.* Parkhurst-Davis Co., 176 U. S. 317.)

While it is true that no suit can be brought against the United States without authority of legislative acts, nevertheless, the United States may sue its debtor in any court of law having jurisdiction of the subject-matter. *Cotton* v. *The U. S.*, 11 How. 229; *Merryweather* v. *United States*, 12 Fed. 2d 407.

The United States may intervene in a State Court action and by appearing as claimant in such court, the United States subjects itself to the jurisdiction of such court. *Johnston* v. *Stimmel, et al.*, 89 N. Y. 117, 121; *U. S.* v. *Ansonia Brass Co.*, 218 U. S. 452, and like any other litigant, will be bound by its decision. *Central Trust Co. of New York* v. *Treat*, 192 Fed. 942; *U. S.* v. *Walker*, 148 Fed. 1022. The effect of the final decree which could be entered in the State Court proceeding would not operate as a money judgment against the United States if it filed a claim in that proceeding and the claim was disallowed. Under this test, the United States is not being sued directly or indirectly.

It has never been held when an individual appeals to a higher court from a judgment against him obtained by the United States, that the United States is being sued without its consent. The contention of the government in the present case is just as specious. The cases decided by the government on the question of jurisdiction have no application

to the present case. In *U. S.* v. *Inaba** and *U. S.* v. *McIntosh*, the title to property which the United States owned was being attacked. The United States was defending its own title. In those cases the title was in the United States and that title was being questioned by private litigants. In *U. S.* v. *Babcock* the Government was attempting to remove obstructions to federal instrumentalities. It bears no similarity to the case at bar. In the instant case, the United States merely asserts title and the individual litigants are protecting themselves against the asserted claim. These decisions have not yet received the sanction of the Supreme Court. On the contrary *United States* v. *Parkhurst-Davis* (*supra*) held that Section 265 forbade the injunction. The quotation from *U. S.* v. *Lee* is dicta. In any event, the case has no application, since the decision adjudicated conflicting rights between a state and the United States.

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* The case of *United States* v. *Inaba*, 291 Fed. 416, was criticized and its soundness questioned in 37 Harvard Law Review 387 wherein it was stated:

"This is the first case in which the United States, to protect its property, has encountered the statute prohibiting the federal courts from enjoining proceedings in the state courts. See 1911 U. S. Jud. Code, §265. The situation does not fall within any of the recognized exceptions to the statute. *Traction Co.* v. *Mining Co.*, 196 U. S. 239; *Julian* v. *Central Trust Co.*, 193 U. S. 93; *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214; *Marshal* v. *Holmes*, 141 U. S. 589; *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134. See 36 Harv. L. Rev. 461. The court reasons that the United States could not be forced into the state suit, that a federal officer could not intervene voluntarily in that suit, and, therefore, that the United States would be powerless to protect its property except in the federal court and by enjoining the state action. *Stanley* v. *Schwalby*, 162 U. S. 255. See 1911 U. S. Jud. Code, §262. A statute gives the federal courts jurisdiction over suits for allotments of Indian lands. See 28 Stat. at L. 305 amended in 31 Stat. at L. 760. Interpreting this section, the Supreme Court stated that where title to such land was involved, a state court would be without jurisdiction. See *McKay* v. *Kaylton*, 204 U. S. 458, 469; *Stanley* v. *Schwalby*, *supra*, 270. But the federal district attorney, who prosecutes this suit, derives his power from statutes which do not specifically confine him to the federal courts. See 1878 U. S. Rev. Stat., §771; 33 Stat. at L. 824; 27 Stat. at L. 631. *United States* v. *Boyd*, 68 Fed. 577 (W. D. N. C.); *United States* v. *Winans*, 73 Fed. 72 (D. Wash.). He is not, however, required to attend suits in state courts. Compensation of District Attorney, 16 OP. Atty. Gen. 99. If despite these considerations, the United States could have intervened in the state suit, the major premise of the decision is unproved, and §265 should not have been disregarded. If the federal court was the only one open to the United States the exception seems justifiable, if violating the clear words of a statute may be condoned at all."

## Conclusion.

The people of the United States have justly supposed that the policy of protecting property against foreign legislation was fully settled, not by a single decision, but by repeated acts of our courts, performed at frequent intervals.

The court is now called upon to determine whether it should establish a new and doubtful system of policy just proposed, and for the first time presented to its consideration, or whether it shall approve and confirm a long-established system patiently and faithfully built up during a series of years again and again by the New York Courts and other courts of high and revered authority. The parties to the State Court proceeding, in full confidence that the policy was firmly and unchangeably fixed, have accomodated themselves to those rules and proceeded in accordance with them. To proceed to disturb these principles would violate the public faith. The effect of the system which the court is invited to adopt, would lead substantially to foreign domination of American property. The force of the earlier decisions, which covered the actions of the parties in this country, can not now be abated to prevent things in the process of development from reaching their logical conclusion.

There is neither reason nor authority to sustain the contentions of the Government. The decisions of the Courts below are founded on well established precedents.

The decree under review should be affirmed.

Respectfully submitted,

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